Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JAY GREGORY, Sheriff of Patrick County, Virginia,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent,

and

COMPENSATION BOARD OF THE COMMONWEALTH OF VIRGINIA,
Third-Party Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

1. DID THE COURT OF APPEALS MISAPPLY THE NOTICE STANDARD ENUNCIATED BY THIS COURT IN KENTUCKY V. GRAHAM, 473 U.S. 159 (1985), AND BRANDON V. HOLT, 469 U.S. 464 (1985)?

2. ASSUMING ARGUENDO THAT THE FOURTH CIRCUIT CORRECTLY FOUND THAT THE COMPENSATION BOARD OF THE COMMONWEALTH OF VIRGINIA HAD NO NOTICE OR OPPORTUNITY TO RESPOND PRIOR TO THE IMPOSITION OF LIABILITY, DID THE FOURTH CIRCUIT ERR IN

REFUSING TO DISMISS THE DAMAGES AWARD FOR FAILURE TO PROPERLY JOIN A NECESSARY PARTY PURSUANT TO RULE 19 OF THE FEDERAL RULES OF CIVIL PROCEDURE?

B. LIST OF PARTIES TO THE PROCEEDING

The parties to these proceedings are the United States of America (hereinafter referred to as "United States) as Petitioner, Jay E. Gregory, Sheriff of Patrick County (hereinafter referred to as "the Sheriff") as Respondent, and the Compensation Board of the Commonwealth of Virginia (hereinafter referred to as "the Board") as Third-Party Respondent.

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D. REFERENCES TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

1. United States v. Gregory, No.83-0094-D (W.D. Va. July 18, 1986)

2. United States v. Gregory, No.83-0094-D (W.D. Va. May 14, 1991)

3. United States v. Gregory, No.83-0094-D (W.D. Va. March 25, 1992)

4. United States v. Gregory, No.83-0094-D (W.D. Va. April 23, 1992)

5. United States v. Gregory, No.83-0094-D (W.D. Va. June 19, 1992)

6. United States v. Gregory, No.83-0094-D (W.D. Va. December 2, 1992)

7. United States v. Gregory, et al., No. 93-1391 (4th Cir. June 8, 1994)

E. STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

1. The date of the entry of the judgment or decree of the Fourth Circuit Court of Appeals which is sought to be reviewed is June 8, 1994.

2. An order denying the Petitioners Motion for Rehearing and Suggestion for Rehearing en banc was was entered by the

Fourth Circuit on July 1, 1994.

3. This court has jurisdiction to review the judgment or decree of the Fourth Circuit pursuant to 28 USC §1254 and Rule 13 of the Supreme Court of the United States.

F. THE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE

1. Rule 19(a) of the Federal Rules of Civil Procedure, provides in pertient part:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the

person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

2. United States Constitution, Amendment xiv.

G. STATEMENT OF THE CASE, INCLUDING BASIS FOR FEDERAL JURISDICTION OF THE COURT OF FIRST INSTANCE

In June, 1983, the United States sued the then Sheriff of Patrick County, Virginia, Jesse Williams, in his official capacity, alleging that he had unlawfully discriminated against several female job applicants for sworn officer positions in violation of Title 7 of the Civil Rights Act of 1964, as amended. 42 U.S.C. Section 2000E, et. seq. The United States sought an injunction against the Sheriff precluding further discrimination and backpay for those allegedly denied

employment. In October, 1983, as part of its discovery process, the United Staes deposed Paul Trible, a then-member of the Compensation Board of the Commonwealth of Virginia. In December, 1983, before the case was tried in the district court, Williams moved for summary judgment pursuant to Rule 19(a) of the Federal Rules of Civil Procedure because the United States had not joined the Board as a Defendant. Initially, the United States opposed the motion contending that the Board was not indispensable. However, upon review of the Trible deposition, the United States changed its opinion and on the last day of trial in January, 1984, attempted to remedy its oversight by moving to join the Board as an additional defendant. The district judge deferred ruling on this motion stating on the record that he was troubled about how he could add the Board "without retrying the

whole case." After trial, the district court granted the Sheriff's motion for a directed verdict holding that deputies in Patrick County were within the personal staff exception of Title 7. United States v. Gregory, 582 F.Supp. 1319 (W.D. Va. 1984) The Fourth Circuit subsequently vacated that judgment and remanded for reconsideration in light of the intervening decision on the scope of the personal staff exception. United States v. Gregory, No. 84-1613, (4th Cir. Oct. 1, 1985). In July, 1986, the district court found that the Sheriff had discriminated against only one complainant and awarded her backpay. It held the applicants for road deputy positions were within the personal staff exception and that maleness was a bona fide occupational qualification for correctional officers. It also denied the still outstanding December, 1983 motion to dismiss for failure to join the

Board stating that although joinder might have been desirable, it was not necessary. United States v. Gregory, No. 83-0094-D (W.D. Va. July 18, 1986) Again, the Fourth Circuit reversed the district court's conclusions on the issue of discrimination. United States v. Gregory, 818 F.2d 1114 (4th Cir.) cert denied, 484 U.S. 847 (1987). On remand, the district court held that the Sheriff had not discriminated against the two remaining female applicants for deputy positions. United States v. Gregory, 726 F.Supp. 640 (W.D. Va. 1988) Again the Fourth Circuit reversed, finding clear evidence of discrimination and remanding the case for an appropriate remedy which would include backpay. United States v. Gregory, 871 F.2d 1239 (4th Cir. 1989), cert denied, 493 U.S. 1020 (1990). After remand, in July, 1990, the Sheriff renewed his motion pursuant to Rule 19 to join the Board as a

party defendant arguing that in the absence of joinder, complete relief could not be accorded to those who were already parties. Although the United States had previously sought to join the Board, it retreated from its prior position and stated merely that it did not oppose the Sheriff's motion. On March 25, 1992, following notice to the Board and a lengthy evidentiary hearing, the district court entered judgment against the Sheriff in his official capacity and granted backpay to the two remaining discrimination victims. On April 14, 1992, the Sheriff renewed his Rule 19 motion to join the Board as a defendant. The Board again opposed the motion and the United States again stated that the dispute was between the Sheriff and the Board alone. In September, 1992, the Sheriff moved yet again for joinder under Rule 19. In support of its motion, the

Sheriff presented an uncontradicted affidavit that the Sheriff's Office had no assets to satisfy the judgment. The Board opposed the motion and the United States again took no position on it. Neither the board nor the United States introduced any affidavits to rebutt the Sheriff's claim that his department had no assets to satisfy the backpay award. After notice to the Board, a hearing was held in November, 1992 on the issue of whether the Board should be joined. At this hearing, the Board was personally present and represented by counsel. Following this hearing and after the submission of briefs by the Board and the Sheriff, the district court granted the Sheriff's motion to join the Board. It further held that the Sheriff of Patrick County was an officer of the Commonwealth and ordered the Board to pay the backpay award. From those rulings, the Board appealed. The Fourth Circuit again reversed the district court finding that "given the peculiar facts of this case, we conclude that the Board

simply was not provided adequate notice of and an opportunity to respond to the United States' suit as required by Brandon and Graham." United States v. Gregory, No. 93-1391, slip op. at 7 (4th Cir. June 8, 1994). It is from this decision that the Petitioner seeks a Writ of Certiorari.

H. ARGUMENT

1. THE FOURTH CIRCUIT MISAPPLIED THE NOTICE STANDARD ENUNCIATED BY THIS COURT IN KENTUCKY V. GRAHAM AND BRANDON V. HOLT, SUPRA.

The Fourth Circuit decision is based on a finding that the Board was not given adequate notice of and an opportunity to respond to the United States' suit. This conclusion arises from the Court's determination "the mere legal fact that a suit against the Sheriff is a suit against the Commonwealth does not constitute notice to the Commonwealth and an opportunity to respond to the allegations made, especially given that in 1983 - just as it does today - the Board had many good reasons to believe under Virginia law that it was not responsible for the Sheriff's

actions." United States v. Gregory, No. 93-1931, slip op. at 7. These conclusions are erroneous for both legal and factual reasons.[1]

The Board has had at least three occasions to participate in the proceeding in the district court prior to the imposition of liability. It failed to take the first two opportunities, but did participate in a full hearing prior to Judge Kiser's order of December 2, 1992 ordering the Board to pay the damage award.

The Board's first opportunity was prior to trial. In Brandon v. Holt, this Court explicitly held that a judgment

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[1]The Fourth Circuit decision does not address the "thorny question" of whether the Commonwealth is the real party in interest in a suit against a Virginia Sheriff. For reasons advanced in his brief and oral argument to the Panel, the conclusion that the Sheriff is, in fact, a State officer is inescapable.

against a public servant in his official capacity imposes liability on the entity that he represents, provided that the public entity received notice and an opportunity to respond. This conclusion, the Court opined, was implicit in at least three prior decisions of that Court beginning with Monell v. New York Department of Social Services, 436 U.S. 658 (1978) and including Hutto v. Finney, 437 U.S. 678 (1978) and Owen v. City of Independence, 445 U.S. 622 (1980). All of these cases antedated the United States' suit against the Sheriff. Given the implicit conclusions of public entity liability for the acts of public servants contained in Monell, Hutto and Owen, it cannot be said that the Board was without notice of its potential liability for the acts of the Sheriff at the time that suit was filed against the Sheriff in 1983.

The Fourth Circuit's statement that

the Board had "many good reasons" to believe it would not be liable for the acts of the Sheriff is inconsistent with Virginia law. Beginning with Burch v. Hardwicke, 71 Va. (30 Gratt.) 24 (1878), the Virginia Supreme Court has clearly categorized a Sheriff as a State officer.

> ... There are many officers, such as city judge, sergeant, clerk, commonwealth's attorney, treasurer, sheriff, high constable and the like, some of whom are recognized by the constitution, while others are not. All these are generally mentioned as city officers, and they are even so designated in the constitution, ... while they are elected or appointed for the city, and while their jurisdiction is confined to the local limits, their duties and functions concern the whole state. They are state agencies or instrumentalities....

71 Va. at 33-34 (emphasis added), cited with approval by the Fourth Circuit in McConnell v. Adams, 829 F.2d 1319, 1327 (4th Cir. 1987). The federal courts in Virginia have relied on the Sheriff's status as a state officer to dismiss

Section 1983 cases brought against him for the operation of local jails. McCoy v. Chesapeake Correctional Center, 788 F.Supp. 890 (E.D. Va. 1992).

In sum, the Board had no good reason to believe, at the time suit was filed in 1983, that it had no potential liability for damages which might be awarded against the Sheriff.

Notice is also inherent in the fact that prior to trial, the United States deposed Charles K. Trible, a member of the Board. The Board was represented at that deposition by the Attorney General. Certainly the fact of the deposition in connection with the suit against the Sheriff, when considered in light of prior decisions of the United States Supreme Court beginning with Monell and the status of the Sheriff as a State officer under Virginia law constituted sufficient notice to the Board of its potential liability

for any damages that may have been assessed against the Sheriff.

The Board had a second notice of potential liability and an opportunity to respond after the trial but well in advance of any finding of liability and the assessment of damages. The United States suit against the Sheriff was filed on June 29, 1983. On the final day of trial, the Sheriff moved to dismiss for failure to join the Commonwealth as an indispensable party pursuant to Rule 19. The United States argued that formal joinder was not necessary, but nevertheless moved to join the State as an additional party defendant. The United States also suggested that the Court defer ruling on the Sheriff's motion until after the trial was completed. Judge Kiser's initial decision in connection with this case, United States v. Gregory, 582 F.Supp. 1319 (W.D. Va. 1984), dismissed

the action on procedural grounds, and did not address the Sheriff's Rule 19 motion to dismiss.

The Rule 19 joinder/non-joinder issue was resurrected by the Sheriff during the hearing on remand which preceded the district court's decision of July 18, 1986. The Court held that formal joinder of the entity represented by the Sheriff was unnecessary.

In the wake of the district court decision of July 18, 1986, the Commonwealth, acting through the Board, without objection, paid all monies awarded to the United States as backpay for Stephanie Ressell, and for the Sheriff's attorney's fees in defense of that case. That portion of Judge Kiser's order recited above was not appealed by any party.

The Rule 19 joinder/non-joinder issue remained in repose until July 13, 1990

after the Fourth Circuit's third remand at which time the Sheriff renewed his motion to join the Board. Copies of his motion were served on the Executive Secretary of the Board and the Attorney General's office. At that time it was clear that the only issues to be resolved were the amount of backpay to which the individual claimants were entitled and who was to pay. On May 14, 1991, the district court provisionally denied all then-pending motions for joinder.

Between May 14, 1991 and March 25, 1992, the date the district court liquidated the backpay awards to the individual claimants, extensive discovery and a two-day trial were conducted. The Board did not at any time elect to participate in these hearings despite prior notice of the Sheriff's attempt to join it for purposes of payment.

A third opportunity for the Board to

participate arose on April 14, 1992, when the Sheriff renewed his motion to join the Board as a party defendant. In all subsequent proceedings, the Board participated through counsel. On June 19, 1992, the district court entered an order reserving ruling on the Sheriff's motion to join the Board "pending defendant's identification of all proper parties." On September 11, 1992, the Sheriff, after identifying the proper parties to be named to effectuate joinder of the State, renewed his motion for joinder.[2] On December 2, 1992, following a full hearing in which the Board participated, the district court granted the Sheriff's motion for joinder and ordered the Board to pay to the United States the award made

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[2]No motion was made by any party to join the County of Patrick or the Patrick County Board of Supervisors as parties to the action after January 20, 1984.

on behalf of the individual claimants. From April, 1992 through December, 1992, the Board was given notice and availed itself of the opportunity to respond. The Board participated fully in these hearings both on brief and oral argument. The Board clearly had notice of its potential liability prior to the determination of the damage award.[3]

In sum, the Board, despite long standing notice of potential liability ignored two opportunities to participate prior to the setting of the damage figure. The fact that it did not choose to participate does not mean that it was not given the opportunity to do so. It is uncontradicted that the Board did have

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[3]No complaint has been made that counsel for the Sheriff did not diligently and competently represent the Sheriff on the issue of liability and the amount of damages.

notice of and availed itself of an opportunity to participate fully in the proceedings in the district court prior to any finding of liability on its part. The Sheriff submits that the notice and opportunity to respond afforded to the Board prior to finding the Board liable is all that is required by the law, and that the Panel decision to the contrary is erroneous and should be reversed.

An additional reason for reinstating the decision of the district court rests on finality. The Fourth Circuit's resolution of this issue opens the door to a continuation of what has already been a lengthy and tedious litigation. The district court will ultimately revisit the issue of who, as between the Sheriff and the Board, will ultimately be responsible for the award of backpay. There is no valid reason to believe that the responsible entity will be a party other

than the Board, and it serves no purpose to perpetuate the litigation to address an issue that was properly decided by the district court.

2. ASSUMING ARGUENDO THAT THE FOURTH CIRCUIT'S FINDING THAT THE BOARD HAD NO NOTICE OR OPPORTUNITY TO RESPOND IS CORRECT, THE PROPER REMEDY IS A DISMISSAL OF THE DAMAGES AWARD FOR FAILURE TO PROPERLY JOIN A NECESSARY PARTY PURSUANT TO RULE 19 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Rule 19 of the Federal Rules of Civil Procedure requires joinder of all persons who are subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action if, in the person's absence, complete relief cannot be accorded among those already parties. Rule 19(a), Federal Rules of Civil Procedure. The test for determining indispensability is two-pronged: (1) can relief be afforded to the Plaintiff without the presence of the other party; and (2) can the case be

decided on its merits without prejudice to the other party? Willis v. Semmes, Bowen & Semmes, 441 F.Supp. 1235 (E.D. Va. 1977). In the instant case, the answer to both questions is no.

It is uncontradicted that the Board was and is a person subject to service of process and its joinder would not deprive the court of jurisdiction. It was also apparent in 1983 that under Virginia law the Sheriff represented the entity of the Commonwealth of Virginia and that the Commonwealth would be liable for his actions under Monell and its progeny. The Sheriff raised the non-joinder issue during trial in 1983, but it was not until the last day of that trial that the United States made any effort to join the Board as a party. Counsel for the United States recognized during the trial that without the Board as a party, full relief might not be accorded to the parties:

MR. GADZICHOWSKE: Your Honor, the plaintiff (United States) has moved the court, pursuant to Rule 19(a) ... to join and add as parties defendant ... the Compensation Board. However, since the purpose of the motion is to insure that complete relief is afforded to those persons whom the court may find are the individual victims of discrimination, this court may wish to defer ruling on this motion until after trial .... the compensation board may ... be a person in whose absence complete relief cannot be accorded among those already in the suit ... the court has the discretion to do - to either - has the discretion under Rule 19(b) either to go ahead with the proceedings with the case or to dismiss the action.

THE COURT: That's the part that bothers me, Mr. Gadzichowske. That discretion has been pretty well removed because we have gone ahead with the case.

The uncontradicted affidavit of the Sheriff establishes that the Sheriff's Department as an entity has no assets available to satisfy the judgment. Indeed, the only funding mechanism which is or was available for the purpose of providing that relief is the Board.

The failure of the United States to

join the Board as a party at the time suit was filed in 1983 cannot be justified by any legal principle in effect at the time. Indeed, as the Supreme Court noted in Brandon v. Holt

> The complaint in this case was filed on February 27, 1978, before Monroe v. Pape was overruled; this explains why the City of Memphis was not named as a defendant in this case.

469 U.S. at 466 (emphasis added).

Monroe was overruled by Monell in 1978. In 1983, there would be no excuse for the failure of the United States to name the Board as a defendant. Indeed, the United States failed to name any entity other than the Sheriff in his official capacity as a defendant. Because of the absence of the Board as a party to the litigation, complete relief cannot be accorded among those already parties and the rights of the Board were prejudiced by its absence. In this case, dismissal of

the damage claim is proper under Rule 19.

I. CONCLUSION

For each of the foregoing reasons, it is respectfully requested that this matter be reheard en banc in accordance with Rules 35 and 40 of the Federal Rules of Appellate Procedure.

J. APPENDIX

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Respectfully submitted,

JAY GREGORY, Sheriff of Patrick County

By _____
Anthony P. Giorno

Anthony P. Giorno
Counsel for Petitioner
P. O. Box 1076
Stuart, Virginia 24171

CERTIFICATE OF SERVICE

I, Anthony P. Giorno, counsel for Petitioner, do hereby certify that I have this the 13th day of October, 1994, mailed a true and exact copy of the foregoing Petition for Writ for Certiorari to Lisa Carol Wilson and Jessica Dunsay Silver, counsel for the Respondent, U.S. Department of Justice, Employment Litigation Section, Post Office Box 65968, Washington, D.C. 20035-5968, John Patrick Griffin, counsel for the Third-party Respondent, State Compensation Board, 101 N. Eighth Street, Richmond, Virginia 23219, and the Solicitor General, (via UPS next day air) Department of Justice, Washington, D.C. 20530.

Anthony P. Giorno

APPENDIX

1

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAY GREGORY, Sheriff,
Defendant-Appellee,

v.

COMPENSATION BOARD OF THE COMMONWEALTH OF VIRGINIA,
Third-Party Defendant-Appellant.

No. 93-1391

Appeal from the United States District Court
for the Western District of Virginia, at Danville.
Jackson L. Kiser, Chief District Judge.
(CA-83-94-D)

Argued: March 7, 1994

Decided: June 8, 1994

Before HALL, MURNAGHAN, and LUTTIG, Circuit Judges.

Reversed and remanded by unpublished per curiam opinion.

COUNSEL

ARGUED: John Patrick Griffin, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellant. Lisa Carol Wilson, UNITED STATES DEPARTMENT

OF JUSTICE, Washington, D.C., for Appellee United States; Anthony Paul Giorno, Stuart, Virginia, for Appellee Gregory. **ON BRIEF:** Stephen D. Rosenthal, Attorney General of Virginia, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellant. James P. Turner, Acting Assistant Attorney General, Jessica Dunsay Silver, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee United States.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

The Sheriff of Patrick County, Virginia, was found to have discriminated against certain female job applicants in violation of Title VII of the Civil Rights Act of 1964, as amended, and was ordered to pay damages in excess of $100,000 to the victims of his discrimination. *After* liability had been imposed on the Sheriff in his official capacity, almost 10 years after the suit had been instituted, the district court joined the Compensation Board of the Commonwealth of Virginia (the "Board") as a third-party defendant under Rule 19(a) of the Federal Rules of Civil Procedure, and ordered the Board to pay the damages assessed against the Sheriff. The Board appeals from the district court's order of its joinder and imposition of liability. Because the Board did not have sufficient notice and an opportunity to respond to the United States' suit before it was ordered to pay the damages already awarded, we reverse.

I.

In June 1983, the United States sued the then-Sheriff of Patrick County, Virginia, Jesse Williams, in his official capacity, alleging that he had unlawfully discriminated against several female job applicants for sworn officer positions, in violation of Title VII of the Civil

Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* The United States sought, *inter alia*, an injunction against the Sheriff from further discrimination and back pay for those allegedly denied employment. In November 1983, appellee Jay Gregory defeated Williams in the sheriff's election and, in January 1984, was substituted as a defendant.

In December 1983, Williams moved for summary judgment, in part because the United States had not joined as a defendant the Board, which Williams claimed was an indispensable party to the litigation. At the time, the United States opposed the motion, contending that the Board was not indispensable. After further discovery, however, the United States learned that the Board reimbursed Patrick County for the salaries and expenses incurred in running the Sheriff's Office.[1] It therefore moved on the last day of trial in January 1984 to join the Board, as well as the Patrick County Board of Supervisors, as additional defendants. The district court deferred ruling on this motion, stating not surprisingly, that it was "troubled about how [it] could add these parties without retrying the whole case." J.A. at 36.

After trial, the district court granted Gregory's motion for a directed verdict, holding that deputy sheriffs were within the "personal staff" exemption of Title VII. This court subsequently vacated that judgment and remanded for reconsideration in light of an intervening decision on the scope of the "personal staff" exemption. *United States* v. *Gregory*, No. 84-1613 (4th Cir. Oct. 1, 1985). In July 1986, the district court found that the Sheriff had discriminated against only one complainant and awarded her back pay. It held that

[1]The precise scheme by which the Commonwealth of Virginia funds sheriffs' expenses is somewhat complicated. During the first quarter of every year, each sheriff submits a proposed budget to the Board. The Board reviews the submitted budgets, and then allocates the General Assembly's lump-sum appropriation to each locality based on population and workload. The manner in which the Board pays out the Commonwealth's funds is through *reimbursement*. In the employment context, the salaries of a sheriff's employees are first paid by the county. The county then certifies to the Board that those funds have been paid, whereupon the Board authorizes the Commonwealth Department of the Treasury to issue a check to the county. *See* Supplemental Appendix at 11.

the applicants for road deputy positions were within the personal staff exemption, and that maleness was a bona fide occupational qualification (BFOQ) for correctional officers. It also denied the still outstanding December 1983 motion to dismiss for failure to join the Board, stating that although joinder might have been desirable, it was not necessary. On appeal of this judgment, the Fourth Circuit reversed the district court's conclusions as to both the road deputies and the correctional officers. *See United States* v. *Gregory*, 818 F.2d 1114, 1116-18 (4th Cir.), *cert. denied*, 484 U.S. 847 (1987).

On remand, the district court held that the Sheriff had not discriminated against two remaining female applicants for deputy positions. Again this court reversed, the panel finding clear evidence of discrimination, and remanding the case for an appropriate remedy, which would include back pay. *United States* v. *Gregory*, 871 F.2d 1239 (4th Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990).

In July 1990, Gregory moved, pursuant to Rule 19 of the Federal Rules of Civil Procedure, to join the Board as a party defendant, arguing that in the absence of joinder, complete relief could not be accorded those who were already parties. J.A. at 72. The Board objected to the motion. Although the United States had previously sought to join the Board, it retreated from its prior position and stated merely that it did not oppose Gregory's motion. *Id.* at 74. The United States also denied Gregory's claim that complete relief could not be accorded in the Board's absence, arguing that backpay was "rightly payable" by the Sheriff as well. *Id.* at 74-75. In May 1991, the district court held that the joinder motion was "procedurally inappropriate" and observed that "the proper procedure would be to proceed with the present defendant, the Sheriff of Patrick County, as the sole defendant and render such judgment as is appropriate in the case. After the judgment is rendered, the United States may then use the processes of this Court to effect collection of any amounts due [it]." *Id.* at 76-77.

On March 25, 1992, the district court entered judgment against Gregory in his official capacity, ordering the Sheriff enjoined from further discrimination and granting back pay to the two remaining discrimination victims. *Id.* at 78-81. An April 23, 1992 order calculated the total award at $118,114, plus interest running from the March 25, 1992 date of judgment. *Id.* at 105. On April 14, 1992, Gregory

renewed his Rule 19 motion to join the Board as a defendant. *Id.* at 106. The Board again opposed the motion, and the United States again stated that the dispute was between Gregory and the Board alone. *Id.* In June 1992, the district court ordered the case stricken from its active docket, with the proviso that it would be reinstated "on the motion of either party for the purpose of enforcement of judgment." *Id.* at 115. The court again deferred ruling on the joinder motion "for the purposes of execution of judgment" until such time as all proper parties had been identified. *Id.* at 119.

In September 1992, Gregory moved yet again for joinder under Rule 19; this time he termed his motion one to add "the Commonwealth of Virginia, by and through the Comptroller of the Commonwealth of Virginia and the members of the [Board]." *Id.* at 120. An accompanying affidavit represented that the Sheriff's office had no assets to satisfy the judgment. *Id.* at 127. Predictably, the Board opposed the motion, and the United States again took no position on it. *Id.* at 122. After a hearing in November 1992, the district court granted Gregory's motion to join the Board. It also held that the Sheriff of Patrick County was an officer of the Commonwealth and therefore that the Commonwealth was liable for his discrimination. The Commonwealth was ordered to pay the Sheriff's damages. *Id.* at 143-45. From these rulings, the Board now appeals.[2]

II.

On appeal, both the United States and Gregory claim that consideration of the joinder issue is unnecessary, on the grounds that the Sher-

[2]As a threshold matter, we reject Gregory's contention that the Board's notice of appeal was deficient. The Board appealed from the district court's February 2, 1993 order clarifying its December 2, 1992 order that joined the Board and instructed the Commonwealth to pay the Sheriff's damages. *Id.* at 150. In the February 2, 1993 order, the district court "reiterate[d]" its prior decision that the Commonwealth was liable. *Id.* at 149. Hence, Gregory's statement that "[n]either the order nor the Board's motion revisits the issue resolved ... on December 2, 1992 and challenged on brief by the Board, that being the liability of the State for the damages assessed against the Sheriff," Appellee's Brief at 5, is simply incorrect.

iff was sued in his official capacity, and therefore that the entity he represents, which they contend is the Commonwealth, was always the real party in interest in the litigation. *See* Appellee's Brief at 7 ("[T]he Sheriff and the State [*sic*] are the *same* entity."); Brief of the United States at 20-21 ("Although the district court joined the State Compensation Board under Rule 19(a), we believe that an analysis of Rule 19(a) is not necessary in this case.... [T]he district court order is based upon the conclusion that the Sheriff was acting as a state official, this systematically [*sic*] makes the Board liable for any monetary remedy resulting from the Sheriff's discriminatory conduct."); *see also id.* at 11 ("[T]he Board is not a separate entity from the Sheriff and, therefore, joinder is unnecessary.").

We need not decide in this case the thorny question of whether the Commonwealth of Virginia is the real party in interest in an official-capacity suit against one of the Commonwealth's sheriffs. Even assuming that it is, the Commonwealth still must have had notice and an opportunity to respond for it to be held liable for the actions of its agents. In *Brandon* v. *Holt*, 469 U.S. 464 (1985), in the course of summarizing past decisions involving official capacity suits, the Supreme Court stated:

> In at least three recent cases arising under § 1983, we have plainly implied that a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents *provided, of course, the public entity received notice and an opportunity to respond.* We now make that point explicit.

Id. at 471-72 (emphasis added).[3] Likewise, in *Kentucky* v. *Graham*, 473 U.S. 159 (1985), the Supreme Court explained that,

> *[a]s long as the government entity receives notice and an opportunity to respond*, an official-capacity suit is, in all

[3]In *Brandon*, the Court allowed the plaintiffs to amend their pleadings on appeal to name the City of Memphis as a party, but it specifically noted that "the Police Department and the city received notice; no claim is made that the Director of Police and the city were without due notice of the proceedings." *Id.* at 472 n.20.

> respects other than name, to be treated as a suit against the entity [of which an officer is an agent].

Id. at 166 (emphasis added). Given the particular facts of this case, and due in large part to the vacillation of the United States and Gregory as to whether the Board should have been added, we conclude that the Board simply was not provided adequate notice of, and an opportunity to respond to, the United States' suit, as required by *Brandon* and *Graham*.

In imposing liability on the Commonwealth, the district court asserted, without explanation, that no notice rights had been violated because "[a] suit against a state officer is tantamount to a suit against the state itself." J.A. at 145. In their briefs, appellees have not attempted to enlarge upon this conclusion. The United States, for example, has stated merely that "the Commonwealth has had sufficient notice of the Title VII lawsuit since it was filed by the United States in 1983." Brief of the United States at 20.

The mere legal fact (assuming it is such here) that a suit against the Sheriff is a suit against the Commonwealth does not constitute notice to the Commonwealth and an opportunity to respond to the allegations made, especially given that in 1983 — just as it does today — the Board had many good reasons to believe under Virginia law that it was not responsible for the Sheriff's actions. The office of a Virginia sheriff is created by Article VII, Section 4 of the Virginia Constitution, which provides:

> **County and city officers.** — There shall be elected by the qualified voters of each county and city a treasurer, a sheriff, an attorney for the Commonwealth, a clerk, who shall be clerk of the court in the office of which deeds are recorded, and a commissioner of revenue. The duties and compensation of such officers shall be prescribed by general law or special act.

VA. CONST. Article VII, § 4. Virginia courts have consistently interpreted this constitutional provision as rendering Virginia sheriffs independent "constitutional" officers, who are beholden neither to local governing bodies, nor to the Commonwealth, but rather only to

the voters who elected them. *See Hilton* v. *Amburgey*, 198 Va. 727, 728, 96 S.E.2d 151, 152 (1957) ("Sheriffs . . . do not hold their offices by virtue of authority of the General Assembly or by virtue of authority of a municipality or county."); *Narrows Grocery Co.* v. *Bailey*, 161 Va. 278, 284, 170 S.E. 730, 732 (1933) (sheriffs are constitutional officers); *Sherman* v. *City of Richmond*, 543 F. Supp. 447, 449 (E.D. Va. 1982) ("[N]either the City of Richmond nor the Commonwealth of Virginia is responsible for the actions of the Richmond Sheriff's Department."); *see also Olivo* v. *Mapp*, 838 F. Supp. 259, 261-62 (E.D. Va. 1993) (holding that sheriff acts as independent officer when making employment decisions); *Jenkins* v. *Weatherholtz*, 719 F. Supp. 468, 469 (W.D. Va. 1989), *aff'd. in relevant part*, 909 F.2d 105 (4th Cir. 1990) (noting "unique" scheme under which Virginia sheriffs are independent officers); VA. CODE. ANN. § 24.2-202 *et seq.* (distinguishing among elections for "statewide," "local," and "constitutional" offices); 1990 Att'y Gen. Ann. Rep. 21, 22 (stating that sheriffs are neither Commonwealth nor local government employees). Consistent with this unique status of the Sheriff under Virginia law, the Commonwealth exercises virtually no control over the day-to-day operations of its sheriffs' offices. That the Commonwealth would not necessarily have been on notice that it might potentially be liable for damages owed by the Sheriff is confirmed by the fact that the United States itself believed that the Board was not an indispensable party. J.A. at 36-37.

As for what additional procedural safeguards might have been provided, it is relevant to contrast the United States' conduct toward the Board in this case with the opportunities provided the Commonwealth in *Kilgore* v. *McClelland*, 637 F. Supp. 1253, 1257-58 (W.D. Va. 1986), *aff'd. in relevant part*, *McConnell* v. *Adams*, 829 F.2d 1319 (4th Cir. 1987), *cert. denied sub nom. Virginia ex rel. State Bd. of Elections* v. *Kilgore*, 486 U.S. 1006 (1988). In *Kilgore*, certain local Virginia electoral board members and general registrars were sued under section 1983 in their official capacities, thus raising the question of whether the Commonwealth was responsible for their allegedly unconstitutional actions. The district court specifically recognized the significance of *Brandon*'s holding that in official capacity suits, the government entity must have received notice and an opportunity to respond. *See id.* at 1257. It thus extensively analyzed the notice issue and found that the plaintiffs' complaints had

also named the Secretary of the State Board of Elections as a defendant; that the Secretary was represented by the Office of the Attorney General; and that the Commonwealth had been allowed to appear, file a brief, and make oral argument before trial as *amicus curiae*. *See id.* Attorneys for the Commonwealth also participated in a hearing on post-trial motions, after which they were allowed to file additional briefs. *See id.* at 1257-58.

In this case, by contrast, the litigation proceeded for six years, and Title VII liability was imposed, before the Board was even contacted. When the Board finally was contacted, it was for the sole purpose of shifting what had already been determined to be the Sheriff's liability to the Board, as indemnitor. During the crucial years of trial and appeal, the Board's interests were never represented. The Board was never able to contest, for example, whether the discrimination at issue occurred, or whether the victims attempted to obtain other employment in mitigation of damages, or whether the periods for which backpay was awarded were accurate. Gregory's attorney certainly cannot be said to have advanced the Board's interests; in fact, he moved for dismissal based on the fact that the Commonwealth had not been joined and was not represented.

Given the manner in which this litigation proceeded, countenancing the imposition of Title VII liability on the Board would necessitate stretching the procedural laxity permitted in official-capacity suits so far as to violate even the most elemental requirements of procedural fairness expressly required by the Supreme Court in *Brandon* and *Graham*.[4] This we refuse to do.

[4]Our conclusion in this regard is not affected by the facts that in early 1984, a Board member named Trible was deposed on the question of how Virginia sheriffs' offices are funded, and that the Board, pursuant to a 1989 *ex parte* state court order, has reimbursed Patrick County for some of Sheriff Gregory's legal fees and a prior backpay award. Even if these facts could constitute sufficient notice of the underlying suit to support liability against the Commonwealth, there is no indication that the Commonwealth ever had, as it did in *McConnell*, the requisite "opportunity to respond" to the United States' allegations of discrimination.

The judgment of the district court, joining the Board as a third-party defendant after judgment already had been entered on the underlying discrimination claim and ordering it to pay the damages awarded against the Patrick County Sheriff, is reversed, and the case is remanded to the district court.[5] On remand, the United States, as it did originally, may fully avail itself of the processes of the district court to execute on its judgment against the Sheriff's Office; it may not, however, proceed directly against the Commonwealth of Virginia. As the United States has consistently maintained, the ultimate responsibility for payment of the damage award in this particular case is a matter between the Sheriff and the Commonwealth.

REVERSED AND REMANDED

[5]Because of our disposition of the Board's appeal, we do not reach the Board's alternative arguments under the Tenth and Eleventh Amendments.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	Civil Action No. 83-0094-D
SHERIFF JAY E. GREGORY, Defendant.	)	ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby ADJUDGED AND ORDERED that the defendant's motion to join the Compensation Board of the Commonwealth of Virginia as a third-party defendant is GRANTED. It is further ordered that the Commonwealth must pay the damages assessed against the sheriff as set forth in this Court's prior decision.

The clerk is instructed to strike this case from the docket and send a certified copy of this order and accompanying memorandum opinion to all counsel of record.

ENTERED this 2nd day of December,

1992.

/s/ Jackson L. Kiser
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
	)	Civil Action
v.	)	No. 83-0094-D
SHERIFF JAY E. GREGORY, Defendant.	)	

Memorandum Opinion
By: Jackson L. Kiser, Judge
United States District Court

The United States prevailed in a Title VII suit filed against the Sheriff of Patrick County, Virginia on behalf of several women who alleged discriminatory hiring practices by the sheriff when hiring deputies. After damages were assessed, the sheriff filed a motion to join the Compensation Board of the Commonwealth of Virginia ("Commonwealth") as a third-party defendant under Rule 19(a) of the Federal Rules of Civil Procedure. Finding merit with the sheriff's arguments, I will grant this motion to join the Commonwealth and order

that the Commonwealth pay the sheriff's damages in the underlying action.

Discussion

The critical question in this case is whether the sheriff in his official capacity has a sufficient nexus with the Commonwealth to require the payment of the money judgments rendered against him from the state fisc. Based on an examination of state law, I find that a sufficient nexus exists. Dotson v. Chester, 937 F.2d 920 (4th Cir. 1991).

In objecting to the motion for joinder, the Commonwealth argues that as a constitutional officer, the sheriff enjoys substantial autonomy from the state and therefore he should not look to the state to pay his damages. It asserts that he is an arm of Patrick County and as such, the county (and the voters who elected him) should bear the financial burden for his misdeeds. It further argues that imposing

this financial burden on the state would violate its Tenth and Eleventh Amendment rights under the Constitution. Finally, the Commownealth argues that joinder at this late stage of the proceeings would violate its due process rights. I find no merit to any of these arguments.

The sheriff maintains a closer nexum with the Commonwealth than he maintains with Patrick County, particularly with regard to the duties of his office and with regard to employment matters. The Commonwealth pays the salaries and expenses of the sheriff and his deputies. Va. Code Ann. §14.1-79 (1992). The Commonwealth provides such fringe benefits as insurance to the sheriff and his deputies. Id. at §2.1-526.8:1. Patrick County contributes nothing to the sheriff's budget. State statutes empower the sheriff to hire and discharge his deputies and require him to refrain from

discriminating in making hiring decisions. Id. at §15.1-48; 15.1-48.1. His primary law enforcement duties involve state statutes, not county ordinances. The Commonwealth has failed to demonstrate the existence of similar financial and statutory connections between the sheriff and Patrick County. In light of this evidence, the sheriff appears to be far more closely connected to the Commonwealth than to Patrick County. Joinder of the Commonwealth as a third-party defendant is therefore warranted. See McConnell v. Adams, 829 F.2d 1319, 1327 (4th Cir. 1987), cert denied, 486 U.S. 1006 (1988) (the fact that voter registrars are paid by the state supports finding that they are officers of state rather than locality); Burch v. Hardwicke, 71 Va. (30 Gratt.) 24, 35-36 (1878) (cited by McConnell and holding that the local chief of police is a state rather than a local

employee).

The short answer to the Commonwealth's Tenth and Eleventh Amendment arguments is that, pursuant to its powers under the Fourteenth Amendment and the Supremacy Clause of Article VI of the Constitution, Congress abrogated these amendments when it enacted Title VII of the Civil Rights Act of 1964.

Finally, contrary to the Commonwealth's assertions, joinder at this stage of the proceeding does not violate its rights of notice and an opportunity to be heard. A suit against a state officer is tantamount to a suit against the state itself. As such, no due process rights have been violated. See Kentucky v. Graham, 473 U.S. 159 (1985).

Conclusion

I find that the sheriff is an officer of the Commonwealth for purposes of this matter and as such, he is entitled to join

the Commonwealth as a third-party defendant. The Commonwealth is directed to pay the sheriff's damages to the plaintiffs in accordance with the earlier decision of this court.

/s/ Jackson L. Kiser
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 1, 1994

No. 93-1391
CA-83-94-D

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

JAY GREGORY, Sheriff,
Defendant - Appellee

v.

COMPENSATION BOARD OF THE COMMONWEALTH OF VIRGINIA,
Third Party Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition

for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

BEST AVAILABLE COPY

No. 94-691

Supreme Court, U.S.
FILED
OCT 28 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

JAY GREGORY, Sheriff of Patrick County, Virginia,

Defendant-Petitioner,

v.

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

COMPENSATION BOARD OF THE COMMONWEALTH OF VIRGINIA,

Third Party Defendant-Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit correctly held that adding the Board as a third-party defendant violated the fundamental fairness that characterizes our judicial system since the Board did not have notice and an opportunity to participate in the determination of liability?

2. Whether this Court should decline plenary review since there is no conflict among the circuit courts of appeal and the underlying facts are so unique that any decision would provide little guidance to the lower federal courts?

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No. 94-691

In The

Supreme Court of the United States

October Term, 1994

JAY GREGORY, Sheriff of Patrick County, Virginia,

Defendant-Petitioner,

v.

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

COMPENSATION BOARD OF THE COMMONWEALTH OF VIRGINIA,

Third Party Defendant-Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case arises from an action brought by the United States Department of Justice ("DOJ") on behalf of female job applicants for deputy sheriff positions in Patrick County, Virginia. On June 29, 1983, DOJ filed an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII") against Patrick County Sheriff, Jesse W. Williams. *U.S. v. Gregory*, 582 F.Supp. 1319 (W.D.

Va. 1984). DOJ did not assert that Williams was personally liable. Indeed, DOJ was looking to the Patrick County's Sheriff's Department to satisfy any judgment it obtained.

After suit was filed, but prior to trial, Jay Gregory was elected sheriff. Gregory, as the executive head of the sheriff's department, hired or rehired deputies for the Patrick County Sheriff's Department.[1] Gregory did not employ any female deputies. DOJ alleged that Gregory thereby continued a pattern of discrimination against women. DOJ dismissed Williams as a defendant and substituted Gregory. DOJ never determined that Williams did not discriminate against women – indeed, its theory was always that Gregory continued Williams' discriminatory practices. *U.S. v. Gregory,* 871 F.2d 1247 (4th Cir. 1989).

Prior to trial DOJ deposed Charles K. Trible, a member of the Compensation Board of Virginia (the "Board"). The Board is a state agency that allocates state support among Virginia's elected local officers.[2] Each year the Board reviews data concerning each sheriff's statutory duties. The Board then allocates the General Assembly's lump-sum appropriation for sheriffs to each locality based on population and workload. For present purposes the Board's allocation takes the form of reimbursing localities for the salaries of the number of deputies

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[1] The Board plays no role in the selection of deputies.

[2] Under Art. VII, § 4 of the Virginia Constitution such officers, including sheriffs, serve independent of state government. 1986-87 Va. Att'y Gen. Ann. Rep. 69.

needed to perform the statutorily assigned tasks.[3] As DOJ acknowledged, the Board does not approve, or participate in, the selection of the individuals to fill any deputy position. Moreover, DOJ learned that under Virginia's scheme of independent constitutional officers, the Board is not obligated to pay any obligation not contained in an approved budget.[4] DOJ understood that the Board exercises no control over the day-to-day operations of a sheriff's office.

Although DOJ moved to join the Board as an additional defendant on the final day of trial, it argued that

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[3] This fulfills the state's obligation to a sheriff and there is no claim that the Board did not fully fund the approved budget in any year for which relief was ordered. Thus, any payments by the board would not be used for state mandated duties such as service, prisoner transports or courtroom security. Under Virginia law, absent the Board's agreement to fund additional tasks, they are the locality's responsibility. DOJ understood that and indicated that it did not seek recovery from the Board.

[4] Under Virginia law the sheriff or the locality determine if the exigencies of operating the sheriff's office require hiring additional deputies to provide services not funded by the Board. If so, either may appeal the Board approved budget to a three judge court. Va. Code § 14.1-52. If circumstances arise after the budget is approved that require additional state support, sheriffs may seek relief under Va. Code § 14.1-142. Absent an order for state aid under either statute, however, the sheriff or locality pay for items not in the approved budget. *See* § 1-26, Item 69B, 1992 & 1993 Va. App. Acts; Va. Code §§ 15.1-137.3 & 14.1-170. As DOJ noted at trial, absent approval under either statute, Virginia law does not require the Board to pay such costs.

joinder was not necessary.[5] The timing of the motion bothered the district court. The judged noted, "I'm troubled about how I could add these parties without retrying the whole case." DOJ did not press the joinder motion and the district court did not rule on it before initially deciding the case on March 24, 1984. The Board was never served with process and DOJ never took any further action to formally bring the Board into the suit.

After trial Gregory moved for a directed verdict, arguing, as he had in motions to dismiss and for summary judgment, that deputies were within a Title VII exception for the personal staff of an elected official. The district court agreed. The Fourth Circuit vacated and remanded for reconsideration, and ultimately reversed on that issue. *U.S. v. Gregory*, 818 F.2d 1114 (4th Cir. 1987).[6] The district court then found that there was no discrimination. The court of appeals again reversed and remanded for a determination of remedies. *U.S. v. Gregory*, 871 F.2d 1239, 1240 (4th Cir. 1989).

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[5] Although the record is not entirely clear, apparently DOJ's motion was in response to Gregory's Motion to Dismiss for Failure to Add Indispensable Parties.

[6] After the initial reversal, the parties disputed whether the Fourth Circuit resolved the indispensable party issue. Gregory stated: "if the Commonwealth . . . is going to have to pay the tab, are they . . . entitled to or is it mandated that they be joined, because they are represented by the Attorney General's Office, and at this stage of the game the door is basically closed to them." That was on February 5, 1988, more than four years after trial and more than four years before the Board was added "to pay the tab."

On July 12, 1990, Gregory filed a motion to add the Board as a third-party defendant. On May 14, 1991, the district court denied Gregory's 1990 motion and DOJ's 1984 joinder motion. The district judge did not mention having to retry the case but noted, "the proper procedure would be to proceed with [Gregory] . . . as the sole defendant and render judgment as is appropriate . . . [DOJ] may then use the processes of [the district court] to effect collection of any amounts due to [DOJ]."

On March 25, 1992, the district court entered a decision providing for injunctive relief and monetary awards for two women against whom the sheriffs discriminated. On April 23, 1992, the court set the monetary awards. On June 19, 1992, the court enjoined further discrimination by Gregory. On September 11, 1992, Gregory again moved to add the Board as a third-party defendant. On December 2, 1992, the district court added the Board and simultaneously entered judgment against it.[7] The Board appealed. The Fourth Circuit reversed, holding that the Board did not receive proper notice of potential liability for any discrimination.

REASONS FOR DENYING THE WRIT

I. The Decision Below Was Correct.

A. Adding The Board Was Not Fair.

Fundamental fairness requires that parties to judicial proceedings have a meaningful opportunity to participate

[7] Only the judgment for damages was entered against the Board. The injunction is directed to the sheriff, not to the Board.

in the adjudication of the critical allegations of the dispute. *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 470 (4th Cir. 1992) (when intervention granted on the eve of trial, refusal to allow discovery denied intervenors a meaningful opportunity to participate in the resolution of the merits). *See also Bankers Trust Co. v. Bethlehem Steel Corp.*, 752 F.2d 874, 890 (3d Cir. 1985) (parties must have notice and the opportunity to present evidence on the contested facts). Stated another way, the fundamental fairness that characterizes our judicial system precludes binding a party by a decision without allowing that party to represent its own interests in the fact finding process. *Mullane v. Central Hanover Bank*, 339 U.S. 306, 313 (1950) (entity whose interests are subject to diminution not required to allow others, who may conduct a less than adequate defense, to represent its interests). Indeed, "[t]he opportunity to be heard, an essential feature of [our judicial system], is meaningless when afforded only *ex post facto*." *VEPCO v. SCC*, 226 Va. 541, 548, 312 S.E.2d 25, 29 (1984).[8]

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[8] While the Fifth Amendment often does not protect states, this case is an exception. The elastic nature of due process led this Court to conclude that, despite the literal language of the takings clause, localities are protected by the Fifth Amendment. *U.S. v. 50 Acres of Land*, 469 U.S. 24, 31 n15 (1984). Similarly, the Third Circuit has suggested that a state, as a property owner, enjoys protection against takings without due process. *Pennsylvania v. Porter*, 659 F.3d 306, 314 n9 (1981). But even if the Board does not have constitutional rights here, it was still entitled to the basic justice guaranteed all litigants under our judicial scheme. *U.S. v. Cardinal Mine Supply*, 916 F.2d 1087, 1090 (6th Cir. 1990) (the principle that a reasonable opportunity to be heard must precede any judicial determination of rights extends beyond any limitations of the due process clause). Under

Here, DOJ never served the Board with process. Thus, the Board had neither reasonable notice of potential liability nor a reasonable opportunity to participate in the determination of liability. DOJ did not file its motion to add the Board until the last day of trial, although it deposed a Board member three months earlier. Nor did Gregory make any real effort to add the Board as a party prior to trial. The Fourth Circuit's determination of discrimination and the district court's decision on remedies both predated the order adding the Board for the sole purpose of paying damages. Yet no one has ever contended that the Board participated in the discrimination. Thus this case, as the parties chose to litigate it and the district court chose to resolve it, did not give the Board either the opportunity to protect its interests at trial or the opportunity to contest the determination of the damage awards that the district court ordered it to satisfy. It is difficult to imagine a more blatant disregard for the fundamental fairness that our judicial system guarantees.[9]

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analogous facts this Court held "one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process . . . a court has no power to adjudicate a personal . . . obligation unless it has jurisdiction over the . . . defendant . . . [h]ere, Hazeltine was not named as a party, was never served and did not formally appear at trial." *Zenith Radio v. Hazeltine Research*, 395 U.S. 100, 110 (1969). That forecloses any claim that the Board had notice.

[9] When the district court noted its concerns about adding the Board after trial DOJ suggested deposing Trible afforded the Board sufficient notice. Gregory makes a similar claim in the petition. That argument fails under *Hazeltine Research*. There the parties stipulated that Hazeltine Research and its parent, Hazeltine Corp., would be considered the same party for

B. Adding The Board Was Improper Procedure.

1. DOJ first moved to add the Board on the last day of trial. By then, as the district court realized, the critical proceedings were complete. Yet the issues concerning joinder remained unresolved for more than seven years. In the interim the parties appealed and cross-appealed various issues to the Fourth Circuit three times. 871 F.2d 1240. After the remand for a determination of remedies, Gregory converted his dismissal for failure to add an indispensable party argument into an attempt to add the Board. An alleged inability to satisfy the judgment was the stated reason for Gregory's joinder motions.[10] There was still no claim, nor anything in the record to suggest, that the Board played any role in the discrimination. Nevertheless, the district court ruled that since the case, as the parties framed it after ten years of litigation, would not provide adequate remedies if the Board was not added, joinder was proper. The district court was wrong.

Here joinder is controlled by Federal Rules 15 and 19. While Gregory claims that complete relief cannot be

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purposes of that suit. The trial court relied on the stipulation in entering judgment against the parent even though it was not a named party, was never served and did not appear at trial. This Court disagreed noting that although the stipulation was signed by an officer of the parent, he was acting only on the behalf of the subsidiary. Thus, knowledge of a claim is not enough. Since the Board was not served and did not appear at trial, it is not liable.

[10] Contrary to Gregory's claims, the record does not establish that the sheriff has no assets. Indeed, DOJ learned that the sheriff received federal grants. There is no indication, however, whether DOJ explored claiming an offset against those grants.

granted without adding the Board, that does not justify adding the Board after liability was determined. If Gregory is correct, Rule 19 required joinder prior to trial. *Underwood v. Maloney,* 256 F.2d 334, 338 (3d Cir. 1958) (only party capable of providing relief is indispensable). Rule 19 recognizes the need to protect absent persons from the prejudicial consequences of deciding a case without them. *Black Diamond Girl Scouts v. St. Paul Fire & Marine,* 621 F.Supp. 96, 97 (D.W.Va. 1985). The Board reasonably relied on its non-party status. It should not be prejudiced by the parties' self-serving change of heart after a determination of liability. *See CP Nat'l Corp. v. Bonneville Power,* 928 F.2d 905, 912 (9th Cir. 1991) (joinder may be considered anytime but is only proper if no prejudice results).

2. Claims against the Board are time barred. Claimants filed their discrimination charge on July 30, 1980. 871 F.2d 1240 n1. DOJ filed its official capacity suit on June 29, 1983. Gregory did not move to add the Board until July 12, 1990. The limitations period had expired by then (claims against states must be filed within 30 days of EEOC determination). 42 U.S.C. § 2000e-5(e) & (f)(1). Nor was there a reason to toll the statute.

One who does not contribute to or bring about delay is "entitled to rely on [the]statute of limitations and the policies of fairness and repose that it embodies." *Franklin v. Herbert Lehman College,* 508 F.Supp. 945, 952 (S.D.N.Y. 1981). A statute of limitations will not be tolled "under circumstances that would seriously prejudice a [putative] defendant who is not responsible for the delay." *Id.* at 951. Rule 15(c) prescribes when a pleading that changes the party against whom relief is sought relates back to the

original pleading. The three pronged test concerns whether: (1) the claim arose out of the same conduct; (2) the new party received such notice that it will not be prejudiced; and (3) the new party knew that the claim would have been made against it except for a mistake in identifying the proper party. None of those prongs are met here.

First, the claim against the Board does not arise out of the same conduct because the Board did not participate in any discrimination. Nor was there misidentification. DOJ understood that the Board and the sheriff were separate entities and deposed both of them. Nothing during Trible's deposition, the Board's only involvement in the case, suggested that Gregory would resurrect the joinder issue after liability was determined. It is difficult to conceive of circumstances more prejudicial than joining a party more than ten years after the discrimination, after determining the liability of others and merely to satisfy a judgment.[11] The Board was denied the opportunity to participate in the determination of liability, to

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[11] As the court of appeals implicitly recognized, Gregory's reference to the Ressell claim disregards the prohibition against considering efforts to resolve disputes as evidence of liability. F.R. Evid. 408. When the Board reimbursed the county for the settlement of Ressell's claim the Board was not a party to this suit and it appeared that such action might resolve the case (*i.e.*, no court had found that the sheriff discriminated against women). Such a payment should be deemed a settlement effort, not evidence of liability. Also inconclusive is the reimbursement of attorney's fees. The Board did not have the opportunity to participate in the *ex parte* hearings through which Gregory obtained those payments. Indeed, the state court had no jurisdiction over that matter and the orders for those payments were void. The Board's failure to consult with counsel before

present its defense theories and to represent its interests at trial. In such circumstances the court of appeals correctly refused to countenance the untimely claims against the Board.

C. Relief Not Warranted Against The Board.

Employers who violate Title VII have no right to contribution from third parties even if those third parties share some responsibility for the discrimination. *Northwest Airlines v. Transport Workers,* 451 U.S. 77 (1981). If the sheriff would not be entitled to contribution from a co-wrongdoer, it is inconceivable that he should be entitled to indemnification from an innocent third party that did not condone or participate in the discrimination. That lack of culpability controls this case.

In official capacity suits, governmental entities are liable only if they are the "moving force" behind the discrimination. *Kentucky v. Graham,* 473 U.S. 159, 166 (1985). Stated another way, the Board could be liable only if its policy played a part in violating federal law. *Id.* Since the Board takes no part in the selection of deputies and has no policy condoning discrimination, it cannot be liable.

Gregory's contentions to the contrary notwithstanding, sheriffs are independent constitutional officers; they are not state officials. *Sherman v. City of Richmond,* 543 F.Supp. 447, 449 (E.D.Va. 1982); *May v. Newhart,* 822

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honoring what on its face appeared to be a valid court order, should not be held against it.

F.Supp. 1233, 1236 (E.D.Va. 1993); *Olivo v. Mapp*, 838 F.Supp. 259, 261 (E.D.Va. 1993). Unless expressly provided by statute, the state exercises no control over the day-to-day operations of the sheriff's office. When the discrimination occurred, Virginia law addressed only the minimum qualifications for deputy sheriffs. No statute guided a sheriff's final selection of deputies from the qualified applicants. Moreover, the Board merely told each sheriff how many deputy positions the state would fund. The Board did not participate in the selection of any deputy. Simply put, the Board was not the moving force behind the decision not to hire women. Nor has DOJ ever alleged that any policy or custom of the Board played a part in the discrimination. Thus, in this official capacity suit the Board is not liable under *Kentucky v. Graham.*

II. This Case Does Not Warrant Review By This Court.

The court of appeals reversed on a simple tenent of due process – litigants who are not given notice and the opportunity to participate in the determination of liability cannot be held responsible for damages. That holding does not conflict with any decision of this Court or any decision of the various courts of appeals. Thus, the petition does not present an opportunity to resolve any conflict within the judicial system. From that perspective, this case does not warrant review by this Court.

Moreover, the facts in this case are so unique that resolving the underlying conflict will not provide any appreciable guidance in other factual settings. Virginia's system of independent constitutional officers is unique. *Jenkins v. Weatherholtz*, 719 F.Supp. 468, 469 (W.D.Va.

1989). Thus, reviewing this case and addressing the issues concerning a state or local government's responsibility for the payment of Title VII damages under these unique circumstances, will not provide significant guidance for the federal judiciary. Similarly, the procedural issues are not likely to recur – there simply are not that many cases that are appealed to courts of appeals four times while joinder issues remain unresolved. Stated another way, this case does not afford the Court an opportunity to accomplish its goal of providing guidance within the federal judicial system, and the petition should be denied for that reason alone.

III. CONCLUSION

Under the instant facts, the Board was not treated fairly. DOJ's actions at trial suggested it would not hold the Board responsible for any potential liability. Indeed, it was only after liability was established that Gregory moved to add the Board. Thus, the Board had no reasonable opportunity to protect its interests. Moreover, because of the delay in adding the Board, it was procedurally improper to do so. First, the statute of limitations had run on any claim against the Board. Alternatively, fundamental fairness precludes leading the Board to believe it would not be involved until after trial and a determination of liability and then holding the Board responsible for discrimination that it neither controlled nor condoned. Indeed, since the sheriff acted completely independent of the Board, there is no basis for

holding the Board responsible for the sheriff's discrimination. For the foregoing reasons, the Petition For a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 94-691

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In the Supreme Court of the United States

OCTOBER TERM, 1994

JAY GREGORY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that respondent Compensation Board of the Commonwealth of Virginia did not receive adequate notice of, or opportunity to respond to, the instant lawsuit.

2. Whether the court of appeals erred in not dismissing the back pay award when it reversed the district court's granting of the joinder motion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is unpublished, but the judgment is noted at 27 F.3d 564 (Table). The opinion of the district court (Pet. App. 11-18) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1994. A petition for rehearing was denied on July 1, 1994. Pet. App. 19-20. The petition for a writ of certiorari was filed on September 29, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June, 1983, the United States brought a lawsuit against Jesse W. Williams, Sheriff of Patrick County, Virginia, in his official capacity, alleging that the Sheriff discriminated against women seeking employment as deputies, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and seeking relief that included back pay. In November, 1983, petitioner Jay Gregory defeated Jesse Williams in the election for Sheriff of Patrick County. Petitioner was thereafter substituted as the defendant sheriff. Pet. App. 2-3.

Petitioner moved for summary judgment contending, inter alia, that the United States had failed to join as a defendant the respondent Compensation Board of the Commonwealth of Virginia (Board). The United States opposed the motion, stating that the Board was not an indispensable party. Pet. App. 3. After the United States learned that the Board reimburses the county for paying the salaries and expenses of petitioner's office, the United States moved for joinder of the Board and the county board of supervisors. The district court deferred ruling on the motion. *Ibid.*

The district court granted petitioner's motion for a directed verdict, concluding that deputy sheriffs in Patrick County fell within the "personal staff" exemption of Title VII. Pet. App. 3. The court of appeals vacated that judgment and remanded the case for reconsideration in light of an intervening decision by that court on the scope of the "personal staff" exemption. *Ibid.*

On remand, the district court ruled that petitioner had unlawfully discriminated against one complainant and awarded her back pay. The court again denied relief in

other respects, holding that road deputy positions fell within the personal staff exception, and that petitioner's requirement that only males could serve as correctional officers was a bona fide occupational qualification. The district court also ruled on the outstanding motion to dismiss for failure to join the Board, stating that "although joinder might have been desirable, it was not necessary." Pet. App. 3-4. The court of appeals reversed, concluding that the district court's rulings on both the road deputies and the correctional officers were wrong. *Id.* at 3, citing *United States* v. *Gregory*, 818 F.2d 1114, 1116-1118 (4th Cir.), cert. denied, 484 U.S. 847 (1987).

On remand for the second time, the district court ruled that petitioner had not discriminated against the two remaining female applicants for deputy positions. Pet. App. 4; see *United States* v. *Gregory*, 726 F. Supp. 640 (W.D. Va. 1988). The court of appeals reversed, based on its finding of clear evidence of discrimination, and remanded the case for an appropriate remedy, to include back pay. Pet. App. 4, citing *United States* v. *Gregory*, 871 F.2d 1239 (4th Cir. 1989), cert. denied, 493 U.S. 1020 (1990).

On remand for the third time, petitioner moved, pursuant to Fed. R. Civ. P. 19, to join the Board as a party defendant, contending that complete relief could not be afforded absent such joinder. Pet. App. 4. The Board objected to the motion. The United States did not oppose petitioner's motion, but it disagreed with petitioner's contention that joinder was required because complete relief could not be obtained in the Board's absence, asserting instead that "backpay was rightly payable" by petitioner as well. *Ibid.*

On May 14, 1991, the district court denied the joinder motion, finding that it would be "procedurally inappropriate" to join the Board at that time. The court

noted that "the proper procedure would be to proceed with the present defendant, the Sheriff" as the sole defendant and render judgment; thereafter, "the United States may then use the processes of [the district court] to effect collection of any amounts due [it]." Pet. App. 4. The court entered judgment against petitioner in his official capacity on March 25, 1992, enjoined him from further discrimination, and granted back pay to the two remaining discrimination victims. *Ibid.*

On April 14, 1992, petitioner renewed his motion under Rule 19 to join the Board as a defendant. The Board again opposed the motion, and the United States again did not oppose, although it stated that the dispute was between petitioner and the Board. On June 19, 1992, the district court deferred ruling on the joinder motion "for the purposes of execution of judgment" until "all proper parties have been identified." Pet. App. 4-5. On September 11, 1992, petitioner again moved for joinder under Rule 19, seeking to add the Commonwealth of Virginia, by and through its comptroller, and the members of the Board. Pet. App. 5. The Board and the United States adhered to their earlier positions regarding joinder. *Ibid.*

On December 2, 1992, the district court granted petitioner's motion to join the Board, held that petitioner was an officer of the Commonwealth for purposes of this matter and ordered the Commonwealth, in effect through its Board, to fund the damages award. Pet. App. 16.[1] The

[1] The district court's order is couched in terms of ordering joinder of, and payment by, the "Commonwealth," but the district court used that term as a shorthand reference to the Board (see Pet. App. 13). Joinder of the Board is, in effect, joinder of the Commonwealth because the Board is the entity of the Commonwealth that would in fact authorize payment from the state treasury as it does for payments for the sheriff's expenses. See

court noted that the sheriff maintains a closer nexus with the Commonwealth than with the county, that the Commonwealth pays the salaries and expenses of the sheriff and his deputies, that the county contributes nothing to the sheriff's budget, and that state statutes govern the sheriff's authority to hire and discharge deputies. *Id.* at 15-16. The district court rejected the assertion by the Board that joinder violated its right to notice and an opportunity to be heard, stating that "[a] suit against a state officer is tantamount to a suit against the state itself. As such, no due process rights have been violated." *Id.* at 17, citing *Kentucky* v. *Graham*, 473 U.S. 159 (1985).[2]

2. The court of appeals reversed. Pet. App. 1-10. The court first noted that petitioner and the United States argued that the court need not decide the joinder issue because petitioner was sued in his official capacity as sheriff, and that the district court order was based on the

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Pet. App. 3, n.1 (explaining the "somewhat complicated" scheme by which the Commonwealth of Virginia funds a sheriff's expenses through Board reimbursement of the county).

[2] The district court rejected the Board's Tenth and Eleventh Amendment arguments, stating that "pursuant to its powers under the Fourteenth Amendment and the Supremacy Clause of Article VI of the Constitution, Congress abrogated these amendments when it enacted Title VII of the Civil Rights Act of 1964." Pet. App. 17. The district court correctly determined (*ibid.*) that the extension of Title VII to include state and local governments is constitutional. See, *e.g.*, *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976) (a State's immunity may be abrogated by Congress under Section 5 of the Fourteenth Amendment, which grants Congress authority to "enforce 'by appropriate legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority"); see also *Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Hutto* v. *Finney*, 437 U.S. 678 (1978).

conclusion that petitioner was acting as a state official so that the Commonwealth's Board was liable for any monetary remedy resulting from petitioner's discriminatory conduct. *Id.* at 6. The court declined, however, to reach the "thorny question of whether the Commonwealth of Virginia is the real party in interest in an official-capacity suit against one of the Commonwealth's sheriffs." *Ibid.*[3]

The court of appeals held that regardless of whether the Commonwealth was the real party in interest, it could not be held liable in this case because it did not have adequate notice of the suit or an opportunity to respond before it was held liable for the actions of its agents. Pet. App. 2, 6. The court stated that official capacity suits impose liability on the entity represented by the defendant as long as the entity receives notice and an opportunity to respond. *Id.* at 6-7, citing *Kentucky* v.

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[3] Petitioner acknowledges that the court of appeals declined to determine whether petitioner is a state officer, but petitioner asserts that that fact is "inescapable," pointing to Virginia law. Pet. 12-15 & n.1. The Board disagrees, contending that Virginia sheriffs are not state officials. Resp. Board Br. in Opp. 11. Petitioner does not, however, seek this Court's resolution of the issue and it is not included in the questions presented for review. See Pet. 1-2.

This case does not raise the question pending before the Court in *Swint* v. *Chambers County Comm'n*, No. 93-1636 (argued Jan. 10, 1995). In *Swint*, the question presented is whether an Alabama county sheriff is a final policymaker for a county in matters of law enforcement for purposes of county liability under 42 U.S.C. 1983. Because this case is an employment discrimination lawsuit arising under Title VII, which expressly applies both to States and local governments, it does not raise the same issues as does *Swint* concerning the location of "final policymaking authority" for purposes of Section 1983. Nor does it raise any Eleventh Amendment questions. See note 2, *supra*.

Graham, 473 U.S. 159, 166 (1985); *Brandon* v. *Holt*, 469 U.S. 464, 471-472 (1985). The court found that "[g]iven the particular facts of this case, and due in large part to the vacillation of the United States and [petitioner] as to whether the Board should have been added," the Commonwealth's Board "simply was not provided adequate notice of, and an opportunity to respond" to the suit as required by *Graham* and *Brandon*. Pet. App. 7.

The court reasoned that the mere legal fact (assuming it is such in this case) that a suit against an officer is a suit against the Commonwealth does not constitute notice to the Commonwealth and an opportunity to respond to allegations. The court stated that "the Board had many good reasons to believe under Virginia law that it was not responsible for the Sheriff's actions," and identified various state legal authorities suggesting that view. Pet. App. 7-8.[4] The court also contrasted the circumstances of this case, in which the Board's interests were never represented during the "crucial years of trial and appeal," with a case against Virginia electoral board members and general registrars in which a state official had been sued and represented by the Office of the Attorney General, the Commonwealth had filed a brief and appeared at pretrial oral argument as amicus curiae, had appeared at a post-trial hearing on motions, and had

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[4] Although the court of appeals assumed, arguendo, that a suit against petitioner was a suit against the Commonwealth, it also discussed various aspects of Virginia law that could have led the Commonwealth to believe that petitioner and other county sheriffs are independent officers under Virginia law and not officers of the Commonwealth or of the county. Pet. App. 7-8. As noted above, the court did not resolve what it termed "the thorny question" of whether the Commonwealth is the real party in interest in an official-capacity suit against a Virginia sheriff, and petitioner does not present that question for this Court's review. See Pet. 1-2.

filed additional briefs thereafter. *Id.* at 8-9. The court reasoned that, in the present case, the Board was not able to contest issues regarding whether discrimination occurred, mitigation of damages, or the accuracy of the back pay award. The court found that the Board was contacted only to shift the sheriff's liability to the Board as indemnitor. The court concluded that imposing liability on the Board would stretch "the procedural laxity permitted in official-capacity suits so far as to violate even the most elemental requirements of procedural fairness expressly required by the Supreme Court in *Brandon* and *Graham*," and it refused to do so. *Id.* at 9.

The court of appeals stated that on remand the United States may proceed against petitioner's office for execution of the judgment, but "[a]s the United States has consistently maintained, the ultimate responsibility for payment of the damage award in this particular case is a matter between the Sheriff and the Commonwealth." Pet. App. 10.[5]

ARGUMENT

1. Petitioner contends (Pet. 11-22) that the court of appeals misapplied the requirement set forth in *Kentucky* v. *Graham*, 473 U.S. 159 (1985), and *Brandon* v. *Holt*, 469 U.S. 464 (1985), that an entity be given notice and an opportunity to respond to a lawsuit before being held liable. Petitioner claims (Pet. 12-20) that the Board had notice and had at least three opportunities to participate in the district court proceedings prior to imposition of liability.

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[5] The court of appeals declined to reach the Board's arguments under the Tenth and Eleventh Amendments. Pet. App. 10 n.5.

Petitioner correctly points out that the record reveals that the Board had adequate notice of, and an opportunity to respond to, the United States' lawsuit. In November, 1983, prior to trial, the United States deposed Charles K. Trible, a member of the Board, regarding the funding of Virginia Sheriffs' offices. Mr. Trible was represented by an attorney from the Virginia Attorney General's office. See Pet. 15; Pet. App. 9 n.4. Also, the issue of the Commonwealth's liability for back pay awards arose many times during the course of the litigation prior to the district court's order of December 22, 1992, joining the Board as a defendant. See Pet. 16-20. Moreover, the Commonwealth, through the respondent Board, in fact reimbursed the county for the back wages awarded to one discrimination victim in July, 1986, and for the cost of legal counsel representing petitioner. See Gov't C.A. Br. 19; Pet. App. 9 n.4. In these circumstances, we believe that the Commonwealth not only had adequate notice (as the court of appeals appears to acknowledge, see *ibid.*), but also had adequate opportunity to dispute its liability for the back pay awards now in issue. Accordingly, under this Court's decisions in *Brandon* and *Graham*, the district court properly joined the Commonwealth's Board as a third-party defendant.

Nonetheless, we do not believe that the court of appeals' decision reversing the district court's joinder order warrants this Court's review. The court of appeals' opinion specifies that "the United States * * * may fully avail itself of the processes of the district court to execute on its judgment against the Sheriff's Office [and that] the ultimate responsibility for payment of the damage award in this particular case is a matter between the Sheriff and the Commonwealth." Pet. App. 10. We believe that under state law governing the funding mechanism for petitioner's expenses (see *id.* at 3

n.1), the Commonwealth is ultimately liable for payment of the back pay awards. Thus, the ruling will not prevent the United States from obtaining the back pay awards on behalf of the discrimination victims.

Moreover, the question whether respondent Board had adequate notice and an opportunity to respond, as required by *Brandon* and *Graham*, is not of sufficient general importance to warrant review by this Court. The case involves an unique and complicated state funding scheme, presents circumstances that are unlikely to occur again (see Pet. App. 7 (court of appeals emphasizing "the particular facts of this case" as basis for ruling)), and an unpublished opinion that will not determine the resolution of any other cases. See Pet. App. 1, 2.

2. Petitioner also contends (Pet. 22-26) that, if the court of appeals correctly determined that respondent Board did not have adequate notice or opportunity to respond, the proper remedy is dismissal of the back pay claims for failure properly to join a necessary party.

This contention is not properly before the Court. Although petitioner raised this issue in the district court, he failed to do so in the court of appeals and it is therefore waived. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, the absence of a necessary party does not require that an action be dismissed. See Fed. R. Civ. P. 19(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1995